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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1928

No. 13

BEKINS VAN LINES, INC.
(a corporation), et al.,
Appellants,

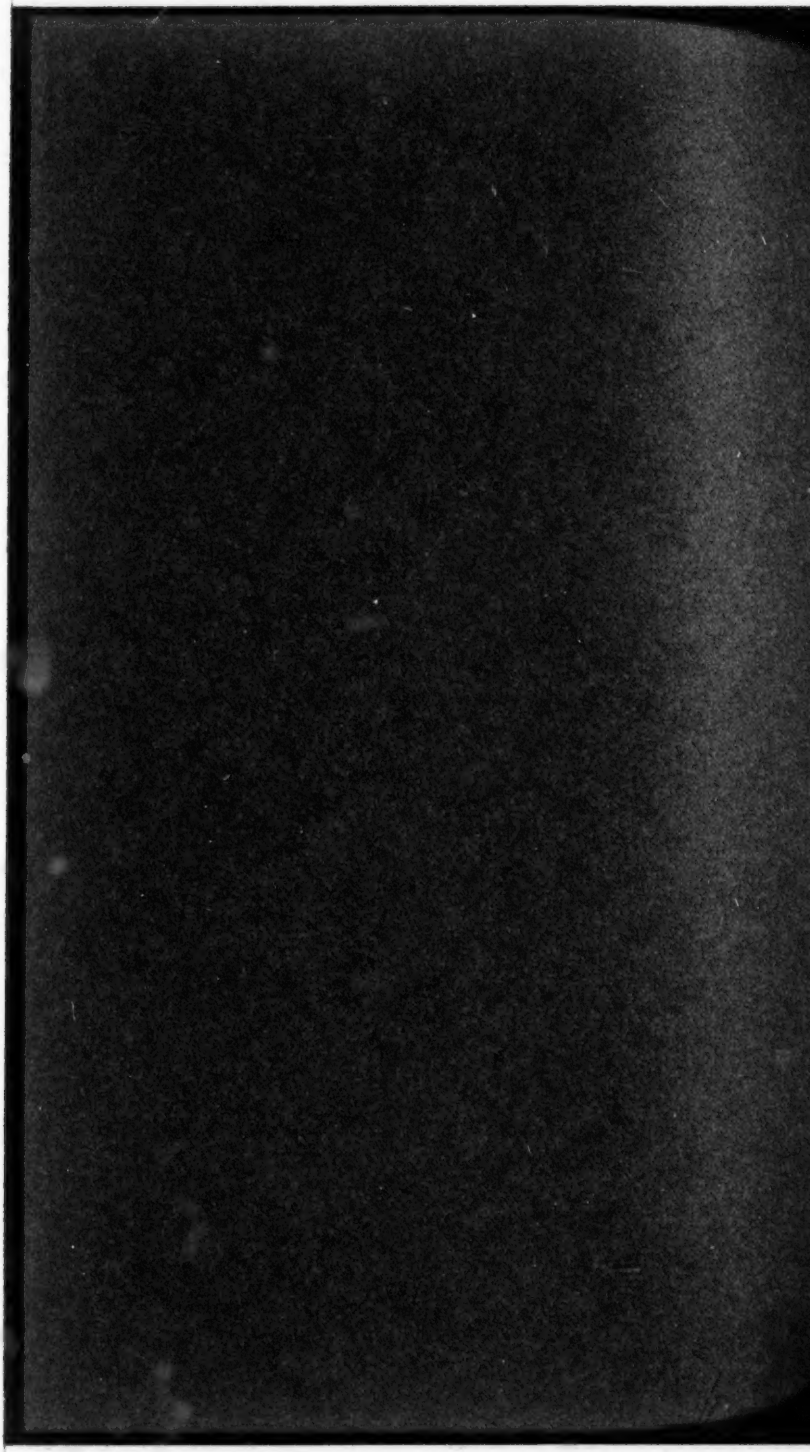
vs.

RAY L. RILEY, as State Controller of California,
Appellee.

APPELLANTS' STATEMENT DISCLOSING BASIS OF JURISDICTION TO REVIEW ON APPEAL.

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Solicitors for Appellants.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 530

BEKINS VAN LINES, INC. (a corporation), et al.,
Appellants,
vs.
RAY L. RILEY, as State Controller of California,
Appellee.

APPELLANTS' STATEMENT DISCLOSING BASIS OF JURISDICTION TO REVIEW ON APPEAL.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

This is an appeal from an order or decree made and entered by the District Court of the United States in and for the Southern Division of the Northern District of California, wherein the appellants herein were denied their motion for an interlocutory

injunction and the motion of the appellee to dismiss the bill was granted. Both motions came on to be heard at the same time; they were argued and submitted together and were decided by the Court, three judges sitting during the proceedings, in one order or decree. (Minute Order Submitting Motions, Cl. Tr. p. 30. Order and Decree Refusing Plaintiffs' Motion for an Interlocutory Injunction and Granting Defendant's Motion to Dismiss, Cl. Tr. p. 33.)

No opinion was rendered or filed by the District Court.

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The proceedings were instituted under the provisions of Section 266 of the Judicial Code, Section 380 U. S. C. A., Title 28, and the appeal to this Court is prosecuted under the same statute and under Section 238 of the Judicial Code, Section 345 U. S. C. A., Title 28.

Appellants' motion for an interlocutory injunction was based upon their *verified* bill of complaint. (Cl. Tr. pp. 1 to 17.) A notice of motion and order to show cause were served upon the appellee more than five days before the date of hearing. (Order to Show Cause, Cl. Tr. p. 20. Notice of Motion for Interlocutory Injunction, Cl. Tr. pp. 21, 22.)

The Governor and Attorney General of California were respectively duly and regularly served with copies of the bill of complaint and of notice of motion on July 21, 1928, which was nine days before the date of hearing thereof. (Cl. Tr. p. 23.) The motions of

the respective parties were heard and submitted on July 30, 1928. (Minute Order, Cl. Tr. p. 30.)

DATE OF THE DECREE AND DATE OF APPEAL.

The order or decree denying the motion for an interlocutory injunction and granting the motion to dismiss was made on July 31, 1928. (Minute Order, Cl. Tr. p. 31; Order and Decree, Cl. Tr. p. 33.) The decree was filed and entered August 10, 1928. (Cl. Tr. p. 33.) Application for appeal was presented and order allowing appeal was made and filed on September 8, 1928. (Cl. Tr. pp. 34, 35.)

NATURE OF THE CASE AND RULINGS BELOW.

Since no opinion was rendered or filed by the Court below the nature of the case is stated with some detail.

The appellants sought by their bill of complaint to enjoin the appellee, Ray L. Riley, as State Controller of California, from enforcing the collection of an annual 5% gross receipts highway tax assessed and levied against the appellants as common carriers *operating between fixed termini or over regular routes* upon the public highways of the state for compensation, said State Controller being authorized and directed under the laws of California to collect said taxes. (Bill of Complaint, paragraphs II, III, Cl. Tr. pp. 4, 5.)

The tax in question was established by Chapter 19 of the 1927 Statutes of California. It finds its

authority in an amendment to the State Constitution enacted by the Legislature of the state, Chapter 60, California Statutes of 1925, and approved by the people of the state at a general election held on November 2, 1926. (Bill of Complaint, paragraphs IV and V, Cl. Tr. pp. 5, 6.)

On the hearing in the Court below the only point upon which the Court desired or heard argument was the reasonableness of the classification. As previously stated, no opinion was rendered or filed by the Court, comprised of Circuit Judge Hunt and District Judges St. Sure and Kerrigan, in deciding the motions.

In order to further show that the nature of the case and the rulings below were such as to bring the cause within the jurisdictional provisions relied on a recital of some of the admitted facts set forth in the verified bill of complaint is in order.

The complainants are all classified as common carriers of freight or property for compensation, between fixed termini or over regular routes using the public highways and, as such, subject to the assessment and levy of the said highway tax of five per cent of their gross annual receipts. (Bill of Complaint, paragraph V, Cl. Tr. pp. 5, 6.)

The said constitutional amendment, and the said statute enacted to carry same into effect, provide that said taxes shall be entirely and exclusively for highway purposes, to be assessed and levied by the Board of Equalization of California and collected by the State Controller, and that said taxes shall be in lieu of all other taxes and licenses, state, county and

municipal, upon the property of the common carriers aforesaid used exclusively in the operation of their transportation business in said state, and that one-half of said taxes so collected shall be devoted exclusively to the maintenance and repair of public highways within the state, and the remaining one-half thereof shall be apportioned among the fifty-eight counties of said state, the apportionment to be based upon the registration of automobiles in each county, and the funds distributed to the counties shall likewise be used exclusively for highway purposes. (Bill of Complaint, paragraph VII, Cl. Tr. pp. 7, 8.)

> "That said highway taxes provided for by said constitutional amendment are assessed and levied against, and the collection of said tax is limited to, only common carriers transporting persons or property for compensation over any public highway in the state between fixed termini, or over a regular route, excluding school busses when operated by school districts, and are not intended to apply and do not apply and have not been applied to common carriers not operating between fixed termini or over a regular route, transporting persons or property for compensation over any public highway in the state, nor to exclusive contract or private carriers operating for compensation over the same highways, nor to any other class of carriers using said highways; and that such common carriers not operating between fixed termini or over regular routes and such contract or private carriers and all other classes of carriers using said highways are entirely excluded from the payment of said highway taxes and pay no state taxes other than a corporate franchise tax assessed on the basis of the full cash value of such corporate franchise, if they be corporations, but not otherwise, and license taxes and in addition thereto local, county

and municipal taxes." (Bill of Complaint, Paragraph VIII, Cl. Tr. pp. 8, 9.)

"That the major portion of the transportation business of most of plaintiffs herein is limited to the transportation of farm products consisting of fruits and vegetables, mostly perishable, grown in the Santa Clara, Watsonville, Pajaro, Salinas and adjacent valleys situated south of San Francisco Bay, to the San Francisco fruit and produce commission market; that because of the nature of the commodities transported and the necessity for rapid transit said commodities are picked up and loaded on the farms, ranches and orchards where produced and carried into the San Francisco market over the public highways usually between sunset and sunrise to the great advantage and convenience of producer, middleman and consumer and is a service that could not be so rendered by any other existing form of carrier; that the busiest season of the year for plaintiffs and all other common and contract or private carriers operating within said state over the public highways, commences in the late spring and ends in the early fall; that principally during said season of the year and also in a less degree at other times, a large number of motor vehicle common carriers and contract or private carriers, to the extent of at least five hundred operators transporting property for hire over the public highways in California, that do not come within the definition of the common carriers taxed under said constitutional amendment and said act, enter into direct and keen competition with the various plaintiffs herein in the transporting of commodities or property over the public highways of said state; that said common and contract or private carriers not subject to said highway tax are also not subject to regulations as to routes, termini, period of operation, or in any other respect by the State Railroad Commission or any other public state authority, and are not required and do not pay an average annual total of local, municipal, county and state taxes and licenses,

excepting none, and of every kind combined, in excess of twenty-five per centum (25%) or one-fourth (¼) of the amount of the gross receipts or highway tax required to be paid annually by the respective plaintiffs herein where said plaintiffs and the said excluded or non-taxable carriers each use exclusively in said business over the same routes and in direct competition under like conditions, a total taxable operative property of equal full cash or assessable value; that the same average difference between all combined taxes and licenses of every kind as aforesaid required to be paid by all carriers not subject to said highway tax and common carriers subject to said highway tax operating over competitive routes, with taxable operative property of equal full cash or assessed value, prevails throughout the State of California, namely, that said common carriers operating in California subject to said highway tax are thereby assessed and obligated to pay an average of four times the amount of taxes, notwithstanding their exemptions from all other kinds of taxes, that all other highway carriers for compensation not subject to said tax are assessed and obligated to pay for all local, municipal, county and state taxes and licenses of every kind combined; that the average full cash value of operative property, that is to say of all property used exclusively in said business of carrier of all common carriers and of all private or contract carriers that operate over the public highways of California carrying property for compensation is not in excess of one fourth (¼) or twenty-five per centum (25%) of the average annual gross receipts derived from such business by said carriers." (Bill of Complaint, Paragraph IX, Cl. Tr. pp. 9. 10, 11.)

"That the average total annual rate or percentage of taxes that carriers not subject to said highway tax operating for hire on the public highways of said state are obliged to pay, which percentage includes all local, municipal, county and state taxes and licenses of every kind com-

bined, does not exceed five per centum (5%) of the full cash or assessable value of said property used exclusively in the operation of the business of carriers as aforesaid, and that said rate or percentage would apply to plaintiffs herein on their property used exclusively in the operation of the business of carriers if said highway tax were not assessed, levied and enforced." (Bill of Complaint, Paragraph X, Cl. Tr. p. 11.)

"That the aforesaid competitors of plaintiffs operating as contract or private carriers and common carriers of property for hire over the said public highways not subject to said tax use the said public highways in the same manner, to the same degree, with same type of vehicles, employ the same methods of operation and have the same source of receipts as the plaintiffs and are in direct and keen competition with plaintiffs; and that said tax is therefore arbitrary, oppressive, unjust, unlawful, illegal, discriminatory and burdensome, and is not justified by reason of any difference in the source of receipts or in the situation or character of the property employed by the common carriers subject to the tax and by those carriers for hire not subject to the tax, and it is therefore class legislation and denies to the plaintiffs the equal protection of the laws in violation of Section 1, Article XIV of the Amendments to the Constitution of the United States." (Bill of Complaint, Paragraph XI, Cl. Tr. p. 12.)

"That plaintiffs have no plain, speedy and adequate or complete remedy at law, and unless defendant is immediately enjoined and restrained from seizing and selling the property of plaintiffs to enforce the collection of said taxes the plaintiffs will suffer irreparable injury and damage and will be deprived of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to said Constitution of the United States in manner following, to wit:

"That plaintiffs are afforded the right by statute to pay said taxes under protest on the ground of illegality and to thereafter bring suit against the Treasurer of the State of California for the recovery of such taxes; that no provision is made for the payment of interest on such taxes paid under protest during the pendency of such suit; that no provision is made by law for the payment of any judgment so recovered; that such judgment cannot be collected by execution against the state or its property or by any of the ordinary processes of law provided for the enforcement of judgments; that no provision for the payment of such judgment so recovered can be made except by specific and separate appropriation and legislation by the legislature of said state in such manner and at such time as it sees fit and that it may at its pleasure refuse to do so; that said taxes are required to be paid into the general fund of said state and within three months thereafter one-half the amount of said collected taxes is required to be apportioned and distributed among the fifty-eight counties of said state; that said taxes could not therefore be traced and refunded by said state treasurer if he had the legal authority to do so in satisfaction of any judgment so recovered; that to recover the one-half of said taxes paid to said counties the plaintiffs would be obliged to institute separate and distinct suits against said counties thereby causing a multiplicity of suits; that the integrity and success of the business of plaintiffs depends upon a continuity of service and that if said property of plaintiffs is seized and sold at public auction by said defendant, plaintiffs will be deprived of the opportunity to transact business therewith and their routes, patronage and business will be thereby wholly disrupted, destroyed and lost beyond recovery or rehabilitation; that no relief or satisfaction in damages could be obtained against said defendant to compensate plaintiffs for the loss of their property, routes, patronage and business, and it would be extremely difficult

> to compute or estimate the amount of such damages; that if said taxes are not paid on or before the sixth Monday after the first Monday in July, 1928, one-half the amount thereof is subject to a penalty equal to fifteen per centum (15%) of the amount thereof and will be added thereto, and an additional penalty of five per centum (5%) will be added to the amount remaining unpaid on the first Monday in February, 1929; that if said taxes are not paid on or before the Saturday preceding the first Monday in March, 1929, the plaintiffs herein that are corporations will have their respective corporate rights, powers and privileges suspended and thereafter will be incapable of exercising the same." (Bill of Complaint, Paragraphs XV, XVI, Cl. Tr. pp. 15, 16, 17.)

The appellants sought by the prayer of their bill and on their motion for interlocutory injunction, to enjoin the appellee or State Controller of California from taking any steps, action or proceedings to enforce or compel the appellants to pay or discharge the said highway tax; that said constitutional amendment and the statute giving efficacy thereto be declared in violation of the Fourteenth Amendment of the Constitution of the United States and null and void, and that the said appellee be perpetually enjoined from collecting said taxes or any portion thereof, and for general relief in equity. (Bill of Complaint, Cl. Tr. p. 18.)

The Court heard the motion for an interlocutory injunction of the appellants and also at the same time, the motion to dismiss of the appellee. It denied the former and granted the latter. (Cl. Tr. p. 32.)

From said order or decree the appellants have taken this appeal.

CASES SUSTAINING JURISDICTION TO REVIEW ON APPEAL.

The order or decree is the subject of direct appeal to this Court under the provision of Section 266 of the Judicial Code, Section 380, U. S. C. A., Title 28; likewise under the provisions of Section 238 of the Judicial Code, Section 345, U. S. C. A., Title 28.

The Federal Courts have jurisdiction of a suit to enjoin enforcement of taxes levied by state authorities where the tax is unconstitutional and the state laws afford no adequate remedy.

Hopkins v. Southern California Tel. Co., 72 L. Ed. 178 (Advance Op. decided Jan. 3, 1928);
Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. ....., 28 Sup. Ct. Rep. 7;
Home Telep. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510, 33 Sup. Ct. Rep. 312;
Binderup v. Pathe Exch., 263 U. S. 291, 68 L. Ed. 308, 44 Sup. Ct. Rep. 96.

The application for the preliminary injunction having been pressed to a determination before the Court of three judges the case is properly here on direct appeal.

Interstate Busses Corporation v. Blodgett, 72 L. Ed. p. 243, (Advance Op.), 48 S. C. Rep. 230;

Smith v. Wilson, 273 U. S. 388, 71 L. Ed. 699, 47 Sup. Ct. Rep. 385;
Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 Sup. Ct. Rep. 702.

Dated, San Francisco,
November 28, 1928.

Respectfully submitted,
SAMUEL T. BUSH,
WILLIAM SEA, JR.,
Solicitors for Appellants.